**Atomic Fire Sprinkler LLC *and* Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO.** Case 17–CA–20878

October 18, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

Upon a charge filed by Road Sprinkler Fitters Local Union No. 669, U.A., AFL–CIO (the Union) on September 27, 2000, the Acting General Counsel of the National Labor Relations Board issued a complaint on December 27, 2000, against Atomic Fire Sprinkler LLC, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Subsequently, the Respondent filed an answer to the complaint. On July 5, 2001, however, the Respondent withdrew its answer.

On July 20, 2001, the General Counsel filed a Motion for Summary Judgment with the Board. On July 24, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent, on July 5, 2001, withdrew its answer to the complaint. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be admitted to be true.[1]

In its response to the Notice to Show Cause, the Respondent asserts that as of October 30, 2000, it had only one employee and that, on or about February 17, 2001, it discharged its sole remaining employee and terminated all operations. The Respondent claims that it remains out of business to date and has no intention of hiring any employees in the future. Based on these alleged facts, the Respondent contends that the Board has no jurisdiction over the Respondent from and after October 30, 2000. Thus, in its response the Respondent essentially denies the complaint allegation that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent asserts that its failure to file an answer is immaterial in light of the alleged absence of the Board's jurisdiction over it.

We find that the Respondent's contentions do not warrant either a hearing on the complaint allegations or denial of the General Counsel's motion. The complaint alleges, among other things, that the Respondent and the Union were parties to a collective-bargaining agreement that was effective from October 24, 1997, through March 31, 2000, and that on or about April 1, 2000, the Respondent unlawfully failed to continue in effect all the terms and conditions of employment of the unit employees by ceasing to make payments into the Health and Welfare, Pension, Supplemental Pension, and Education Funds. By its failure to file an answer, the Respondent has effectively admitted these operative facts that give rise to the unfair labor practices alleged in the complaint.

Further, while the Respondent may no longer be in business, this does not constitute good cause for the Respondent's failure to file an answer. Nor is it a basis for denying the General Counsel's Motion for Summary Judgment. As indicated above, the complaint alleges that the Respondent failed on April 1, 2000, to continue in effect all terms and conditions of employment by failing to make benefit fund payments. Even if it is true that the Respondent subsequently ceased business on February 17, 2001, this does not excuse its previous failure to make contributions. The same is true with respect to the Respondent's assertion that it had only one employee as of October 30, 2000; this does not excuse the Respondent's prior failure to comply with its statutory obligations on April 1, 2000.[2]

Accordingly, and based on the withdrawal of the Respondent's answer to the complaint, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, with an office and place of business in Oklahoma City, Oklahoma, has been engaged in the installation and servicing of fire

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

[2] The Respondent may, however, raise in the compliance stage of this proceeding whether the backpay period should end on October 30, 2000, because it "employ[ed] one or fewer employees on a permanent basis" and therefore was privileged to "unilaterally change employees' terms and conditions of employment without affording [the Union] an opportunity to bargain." *Stack Electric*, 290 NLRB 575, 577 (1988) (quoting *D & B Masonry*, 275 NLRB 1403, 1408 (1985)). Alternatively, the Respondent may attempt to show that the backpay period should end on February 17, 2001, because it ceased business.

sprinkler systems. During the 12-month period ending November 30, 2000, the Respondent, in conducting its business operations described above, provided services valued in excess of $50,000 for the following enterprises: Kenneth Burchardt, an enterprise within the State of Oklahoma; Youngblood Industries, an enterprise within the State of Arkansas; and W.H. Bass, Inc., an enterprise within the State of Georgia.

During the 12-month period ending November 30, 2000, W.H. Bass, Inc., a corporation with an office and place of business in Norcross, Georgia, has been engaged in the construction industry, and purchased and received at its Norcross, Georgia facility goods valued in excess of $50,000 directly from points located outside the State of Georgia.

During the 12-month period ending November 30, 2000, Youngblood Industries, an enterprise with an office and place of business in Rogers, Arkansas, has been engaged in the construction industry, and purchased and received at its Rogers, Arkansas facility goods valued in excess of $50,000 directly from points located outside the State of Arkansas.

At all material times, Kenneth Burchardt, an enterprise with an office and place of business in Enid, Oklahoma, has been engaged in the retail sale of furniture products. During the 12-month period ending November 30, 2000, Kenneth Burchardt derived gross revenues in excess of $500,000, and purchased and received at its Enid, Oklahoma facility goods valued in excess of $50,000 directly from points located outside the State of Oklahoma.

We find that, at all material times, W.H. Bass, Inc., Youngblood Industries, Kenneth Burchardt, and the Respondent, have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

We also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All Journeymen Sprinkler Fitters, Apprentices and Unindentured Apprentice Applicants employed by Atomic Fire Sprinkler LLC.

At all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and the Union has been recognized as such representative by the Respondent. This recognition has been embodied in a collective-bargaining agreement, which was effective from October 24, 1997, through March 31, 2000.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

On or about April 1, 2000, the Respondent failed to continue in effect all the terms and conditions of employment of the unit by ceasing to make payments into the Health and Welfare, Pension, Supplemental Pension, and Education Funds.

The subjects set forth above relate to wages, hours, and other terms and conditions of employment of the unit, and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the conduct described above without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and the effects of this conduct.

## CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, and has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1), we shall order the Respondent to continue in effect the terms and conditions of employment of the unit by making the payments to the Health and Welfare, Pension, Supplemental Pension, and Education Funds that it has failed to make since April 1, 2000, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971),

with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

ORDER

The National Labor Relations Board orders that the Respondent, Atomic Fire Sprinkler LLC, Oklahoma City, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to make payments into the Health and Welfare, Pension, Supplemental Pension, and Education Funds on behalf of its unit employees since April 1, 2000. The unit is:

> All Journeymen Sprinkler Fitters, Apprentices and Unindentured Apprentice Applicants employed by Atomic Fire Sprinkler LLC.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all required payments into the Health and Welfare, Pension, Supplemental Pension, and Education Funds that have not been made since April 1, 2000, and reimburse unit employees for any expenses ensuing from its failure to make the required payments, in the manner set forth in the remedy section of this decision.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Oklahoma City, Oklahoma, copies of the attached notice marked Appendix.[4] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to make payments into the Health and Welfare, Pension, Supplemental Pension, and Education Funds on behalf of our unit employees since April 1, 2000. The unit is:

> All Journeymen Sprinkler Fitters, Apprentices and Unindentured Apprentice Applicants employed by Atomic Fire Sprinkler LLC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all required payments into the Health and Welfare, Pension, Supplemental Pension, and Education Funds that have not been made since April 1, 2000, with interest.

WE WILL reimburse unit employees for any expenses ensuing from our failure to make the required payments, with interest.

ATOMIC FIRE SPRINKLER LLC

[3] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."